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Bertha M. McClure v. Edwin E. Dowell : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

BERTHA M. McCLURE,
Plaintiff-Respondent,

vs.

EDWIN E. DOWELL,
Defendant-Appellant.

Case No.
10042

BRIEF OF APPELLANT

Appeal from District Court of Salt Lake County, Utah
Hon. A. H. Ellett, District Judge

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STATEMENT OF THE CASE

a. This appeal presents the question as to whether or not in an action brought in this State to collect child support arrearages, a defense can relevantly and successfully be asserted other than payment; namely, that the mother deliberately violated restrictions upon her place of residence and first took the children to Europe, choosing to support them from her own independent resources, and later concealed their whereabouts from the father.

b. The lower court held that no defense could be relevant other than actual payment, and entered judgment for the net unpaid amount, including interest.

c. Appellant seeks to reverse this judgment and to have the case remanded for trial as to the equitable defense sought to be imposed; and in any event to set aside that portion of the judgment for interest.

d. The material facts of the case are as follows:

Both parties are now before the Utah court, although they were long since married and then divorced in other jurisdictions. Jurisdiction of the Utah court, both as to the parties and the issue involved, was stipulated (Tr. 7, 10, 11), the case originally having been initiated under the Uniform Reciprocal Support Act (R. 1-8). It was further stipulated that the child support payments for the two-year period September 1, 1961 until September 1, 1963 under the decree of the sister state of Alabama had not been paid (Tr. 11-12) for reasons which hereafter follow. There is also no genuine issue as to the following facts:

a. The parties were married in New York December 12, 1950. Two children were born of this marriage, Kelly Culnan, September 28, 1951, and Edwin E., Jr., November 11, 1956.

b. Anticipating divorce, the parties under date of January 29, 1957 entered into a lengthy and carefully drawn property settlement agreement, which is Exhibit D-2 in the record.

c. Thereafter both of the parties established residence in Alabama, and then under date of February 6, 1957 the Circuit Court of Russell County, Alabama, made and entered a decree of divorce (Ex. D-1). Custody of

the children was awarded to the Mother, and the Father was ordered to pay for their support the sum of $150.00 each per month.

d. The settlement agreement, but not the divorce decree, specifically provided that the Father should have certain definite visitation rights as follows:

> "* * * during the entire month of July or August; during the entire period of the Easter, Thanksgiving and Christmas holidays in alternate years and on alternate week-ends for forty-eight hour periods throughout the year."
>
> Further, the Mother "will not, without the prior written consent of the husband, change the permanent residence of said daughter and son nor remove either of them to a place distant more than two hundred fifty (250) miles from Westport, Connecticut, (Buffalo, New York and Port Colbourne, Ontario, Canada excepted) provided, however, that the wife shall be permitted without such consent to remove said daughter and/or son temporarily to a place distant more than two hundred fifty (250) miles from Westport for a total period not in excess of ten (10) weeks in any one year, and further provided that the wife shall be permitted to change the permanent residence of said daughter and son and to remove and keep them at a place distant more than two hundred fifty (250) miles from Westport if said change of residence is necessitated by either the wife's remarriage or by reason of her seeking and obtaining employment at such place. In no event shall the wife remove said daughter or son, either temporarily or permanently, to a place distant more than two hundred fifty (250) miles from Westport without giving to the husband notice

by registered mail at least twenty-five (25) days prior to the date of such removal, in which notice she shall state the date of departure from Westport, and the name of the place, including the street address, to which the children will be removed.

"If the husband is prevented from having visitation or custody as provided in this agreement by reason of the temporary removal of the children, a substitution of dates shall be made between the husband and wife for those periods which the husband was prevented from visiting or having custody of said children. If the permanent residence of the children is removed to a place distant more than two hundred fifty (250) miles from Westport, the parties shall, if the husband so requests, consult and agree upon a different schedule of visitation and custody dates for the husband.

"* * *

"If the marriage between the parties shall be dissolved," as it was, "By order, judgment, or decree of any court of competent jurisdiction, the provisions made by this agreement for the support and maintenance of the wife and for the support, maintenance, and education of their said daughter and son shall be in full satisfaction, discharge," and so forth; "and said agreement shall be incorporated in and made a part of any such order, judgment, or decree. However, this agreement and the provisions herein contained shall survive any such order, judgment, or decree, or any amendment, modification, or vacatur thereof *and shall not be superseded thereby.*" (Par. VIII, subsection (b).) (Emphasis ours.)

e. Thereafter the parties observed and performed the terms of the settlement agreement for some time, the

Father moving to Utah and remarrying and the Mother marrying one John F. McClure, whose name she now bears as plaintiff in this proceeding. This latter marriage likewise did not survive, and plaintiff became entitled to and still receives $650.00 gross per month from McClure in addition to the $300.00 per month payable by appellant (Tr. 17).

f. In November, 1960, when the McClure marriage broke up, the Mother determined to leave the United States for Italy (Tr. 18). For the purpose of this case and under appellant's proffer, this departure was without appellant's consent, and specifically was accomplished in the absence of the written consent provided for by the terms of the settlement agreement set forth above (Tr. 18).

g. Mrs. McClure requested defendant to send the support checks to her in Rome in care of American Express. Defendant did so until September of 1961. At this time, having been effectively deprived of all visitation rights, the Mother being beyond the jurisdiction of the courts of Utah, Alabama or New York, and being advised that the funds he was sending were not being used for the care and support of the children, appellant discontinued payments. The immediate discontinuance was caused when defendant sent an airplane ticket for the older child's transportation from Madrid, Spain, to Salt Lake City. But the ticket was only used to New York; and then it is appellant's proffer — rejected as irrelevant by the lower court, that the Mother and two children dropped out of sight; and that despite appellant's attempts to locate them, he

did not learn of their residence or whereabouts until a contact from plaintiff's attorney in April, 1963 — shortly before this action was brought to collect the omitted payments (Tr. 19).

As noted above, both parties appeared in person before the Utah court below, and stipulated that visitation rights would now again be recognized and that the child support payments would be resumed effective September 1, 1963. Thus the sole remaining issue became the Mother's right to the omitted support money for the two-year period, during which on her own resources and contrary to the settlement agreement, she herself determined to live in Europe indefinitely and to deprive deliberately the Father of his visitation rights with his two children.

The trial court held that in such a case actual payment would be the only available defense (Tr. 11). Accordingly judgment was entered in the sum of $7,046.76 ($7200.00 less the cost of the used portion of the airplane ticket from Madrid, Spain, to New York) (R. 16, 17). Appellant was also assessed $420.00 for interest.

This appeal is from that part of the judgment only which pertains to the net arrearages for the two years and the interest thereon.

ARGUMENT

At the outset it should be noted that we do not have the usual case where the welfare and actual present need for funds for support of the minor children are involved.

In this case the Mother, with ample resources of her

own and on her own initiative, voluntarily took appellant's children along with the rest of her family to Europe for an indefinite stay. She continued to support them from her own and other resources, and only when her whims dictated did she return to this country with her children. Even then it was at her own convenience and months later when she finally bothered in 1963 to call upon the Father and ask (1) for resumption of current payments, which was willingly done as soon as appellant's visitation rights were reestablished; and (2) for appellant to pick up the tab for her European venture from September, 1961 to September of 1963. The record is silent as to how much if anything the Mother paid during this two-year period to care for the children as she toured on her own through Italy, Spain and possibly other countries, until eventually she chose to return to New York and bothered to resume contact with appellant.

Nor do we have the fact situation of *Baker* v. *Baker*, 119 Utah 37, 224 P. 2d 192 (1950). There, with his children in need and himself in contempt for default in paying the attorneys' fees, costs and support money awarded by the Court, the Father failed in his attempt to assert as an excuse for evading his own social, moral and legal obligations, a technical breach by the Mother of the visitation provisions when she had moved the children to Oregon where were her other children, relatives and friends.

Then, too, we do not here have the case where the $7200.00 had been reduced to judgment in Alabama, so that all the Utah court would be doing would be to give "full

faith and credit" to the judgment of its sister State which had vested the accrued payments in the Mother as payee.

It should also be noted that anticipatory settlement agreements such as here involved are valid in New York and elsewhere — indeed are "highly favored in the law". *Hill* v. *Hill,* 23 Cal. 2d 82, 142 P. 2d 417; *Auten* v. *Auten,* 308 N. Y. 155, 124 N. E. 2d 99, 50 A. L. R. 2d 246. The agreements, although always subject to court scrutiny, are sustained even though not included in the divorce decree. *Galusha* v. *Galusha,* 116 N. Y. 635, 22 N. E. 1114, 6 L. R. S. 487, 17 Am. Jur., Divorce & Separations, §§ 905-906; also § 920. But of course they cannot be used to avoid or defeat continuing legal obligations and duties to provide under the relevant circumstances adequate alimony and support money. 17 Am. Jur. 894.

POINT I.

PLAINTIFF, HAVING VOLUNTARILY DEPRIVED THE FATHER OF HIS VISITATION RIGHTS, FORFEITED HER RIGHT TO REIMBURSEMENT FOR SUPPORT PAYMENTS DURING THE PERIOD INVOLVED.

Utah clearly recognizes that a divorcee who voluntarily deprives the father of visitation rights with his children may forfeit her right to reimbursement for support payments during the period involved, and that payment is not the only defense to her action. In *Larsen* vs. *Larsen,* 5 U. 2d 244, 300 P. 2d 596, beginning at page 226 the Court said:

"It is stated on page 886 of 137 A. L. R.:

> 'It would seem, from a perusal of the cases, that *it is recognized by at least a majority of the courts that circumstances may be such as to enable a husband to avoid payment* of permanent alimony or *support and maintenancce of children allowed by decree or order of court, or at any rate payment of past-due instalments thereof, on the ground of laches or acquiescence on the part of the wife.* However, as intimated, the question as to whether such defense is available in a particular case depends upon the circumstances present therein. * * *'

"(1) *A reading of the cases cited in support of the above quoted statement discloses that relief to the father of a minor from such support money judgment depends on the view of the court determining the case as to what is equitable under the circumstances.* We conclude that the evidence is sufficient from which the trial court could reasonably find facts which would support a holding that the respondent is barred from recovering a part of this judgment for back support money on the grounds which the above quotation calls laches or acquiescence but which actually appear to rest on equitable estoppel.[1] We are sending the case back to make findings on those issues for we conclude the evidence is sufficient to support findings either way. The court may make such findings from the evidence already received or the court in its discretion may allow the parties to reopen the case and introduce additional evidence on such questions.

"(2) *In Price* v. *Price,*[2] *we held that because the state is interested in the child's welfare the par-*

[2]*Price* v. *Price,* 4 Utah 2d 153, 289 P. 2d 1044.
[1]*Openshaw* v. *Openshaw,* 105 Utah 574, 579, 144 P. 2d 528.

ents cannot effectively release future payments of support money by agreeing with the other to that effect. However, this does not mean that a mother may not by her actions or representations, or both, preclude herself from recovering past due installments of support money to reimburse her for the money which she has spent for the support of the child. Where the father's failure to make such payments was induced by her representations or actions and where as a result of such representations or actions the father has been lulled into failing to make such payments and into changing his position which he would not have done but for such representations, and that as a result of such failure to pay and change in his conditions it will cause him great hardship and injustice if she is allowed to enforce the payment of such back installments, *she may be thereby estopped* from enforcing the payment of such back installments. So in this case if the trial court finds from the evidence that appellant would not have left his job and gone on a mission for his church but for such representations that she would not require him to pay such installments if he would just leave her and the child alone, and that appellant in reliance upon her representations complied with her request and that thereafter she supported the child and if such payments are collected from him she will be entitled to them for her own use and benefit, and that it would be a great hardship on him to now force him to make such payments, she would now be estopped from forcing him to pay such past due installments as accrued during the time he was filling such mission.

"(3) *If the child has been the beneficiary of equivalent support and education so that the mother is entitled to receive all of said past due support money, she would be free to release, compromise or waive that which is hers. But if the child had been*

> *provided bare shelter and food, and denied the benefit of proper clothes and dental and medical care, then the mother should not be free to waive that portion of past due support money that the child has not received.* The authorities cited above hold that this doctrine is applicable to this extent. It is the prerogative of the trial court to determine these facts and if he finds that facts exist to justify equitable estoppel, he should apply that doctrine and relieve the father from payment of the installments to the extent indicated. Of course, as to future payments, there is no question but what she is entitled to collect from the time she made demand, and appellant does not dispute this. He has been making such payments since her demand for them." (Emphasis added.)

The test laid down by this decision for relieving a father of accrued child support is "what is equitable under the circumstances". The test is certainly not the hard and fast legal rule of the court below that payment is the only defense.

The case now before the court has nothing to do with *future* payments of support and thus does not run afoul of the Price case. The father is paying and since September, 1963 has been paying $300.00 per month for the support of his two minor children. The mother has also recently agreed to allow the father to visit with the children.

In our case it is only equitable that the accrued child support payments be forfeited because the husband did not know where the children were during the period in question; he attempted to locate them; the wife was financially able to live in Europe and to furnish the children "equiva-

lent" support; and she deliberately deprived the husband of his visitation rights during the two-year period. Furthermore, the action of the wife in removing the children from the United States to Italy without the husband's consent or court approval was in complete disregard of the terms of the settlement agreement. By representing that one child would fly to Salt Lake City, Utah from Madrid, Spain, when in fact she caused the child to fly only to New York; in then causing the children to drop out of sight for nearly two years; and by use of the money for things other than the children, she induced the father, indeed precluded the father, from making child support payments during the period involved. His failure to pay payments totaling $7,-046.76, needless to say will cause him great hardship and injustice if the wife is now allowed to enforce the payment of the back installments for the time during which she deliberately denied him the visitation rights to which he was entitled. Now is there the slightest assurance that these funds would be expended for the children, or could benefit them by reimbursement of the Mother for any past care, or otherwise.

Utah is not the only jurisdiction which precludes divorcees from recovering back support for such action. The Rhode Island Supreme Court settled the problem for that state in *Weinbaum* v. *Weinbaum,* 153 A. 303, (1931). In that case the husband had a duty of support. This was conditioned upon the husband having reasonable child visitation rights one day each week. The wife remarried and moved from Rhode Island to Florida. The husband then

stopped making child support payments. When the wife returned to Rhode Island, she filed a petition asking that the husband be held in contempt for failure to make the child support payments. The court stated:

> "Under the facts appearing in the record, there is no merit in the claim that the respondent is in default in his payments while the petitioner was residing in Florida. The obligation of the respondent to pay the weekly sum ordered for the support of the child is conditioned on his being allowed while a resident of Rhode Island to see her once a week at reasonable times and places. The petitioner in electing to take up her residence in Florida, taking the child with her, was no longer in a position to comply with the terms of the decree, and consequently forfeited her rights thereunder so long as she remained in Florida and retained custody of the child."

In the case of *Anderson* vs. *Anderson,* 291 N. W. 508 (1940), the Minnesota court was confronted with a situation in which a divorced mother removed the child from Minnesota to California without her former husband's consent and without the consent of the court. The whereabouts of the child was kept from the husband. Later the mother sought to recover for accrued child support and the trial court denied relief. The wife appealed. The appellate court stated:

> "The trial court was correct in its action and must be affirmed. The decision of this court in the present matter was so clearly forecast by *Eberhart* v. *Eberhart,* 153 Minn. 66, 189 N. W. 592, especially after the explanation in *Fjeld* v. *Fjeld,* 201 Minn. 512,2 77 N. W. 203, that little basis even for specu-

lation remained. In the *Eberhart* case we said, 153 Minn. at page 68, 189 N. W. at page 592: 'The plaintiff has taken the child from the jurisdiction of the court. So long as she keeps him without the jurisdiction, the defendant should be relieved from the payment of support money to accrue in the future and that already accrued should not be enforced against him.

"Plaintiff contends that a collateral attack is being made by defendant on the decree and that therefore it cannot succeed. We cannot agree. Defendant does not contest the validity of the decree or the propriety of the order directing the payment of $25 per month. Defendant's contention in its essence is that the decree, though valid, cannot be the foundation for an order compelling him to pay plaintiff since she has placed herself in such a position by her conduct that she cannot now ask the court to invoke its processes for her benefit. A court should hesitate to grant relief to one who has intentionally violated a material provision of the decree which is sought to be enforced against another. Judicial power is vested in courts to aid those who merit relief. Conduct such as plaintiff has been guilty of certainly does not commend itself. There was no error or mistake on her part but rather a deliberate and intentional act. While there is no doubt that plaintiff could be punished for contempt if jurisdiction could be acquired we do not think that this is the exclusive process. Nor need defendant procure a modification of the decree. The defense, under the facts, was well taken. There may be instances where a party seeking to enforce a decree has been at fault in a minor respect but still has equities that overbalance those of the party seeking to avoid the natural obligation recognized in the decree. In every case the primary duty and re-

sponsibility rests upon the trial court in whom is vested a proper sphere of discretion to decide each case upon the facts as they appear.

"We do not think that plaintiff's return to the state with the child made the decree, under the facts, enforceable as to the accrued, unpaid instalments."

The most recent Minnesota case holding that a wife forfeits her claim to accrued child support when by removing the child from the state she denies the husband child visitation is *State of Illinois, ex rel. Shannon* vs. *Sterling,* 80 N. W. 2d 13 (1956). The case was instituted, like the one before this court, under the Uniform Reciprocal Enforcement of Support Act. Illinois was the initiating state. The mother had removed three minor children from Illinois without the mother's consent and without court approval. The Minnesota trial court dismissed the matter on the ground that the father had been deprived of his right to visit the children. The appellate court stated:

"The Minnesota law as to the liability of the husband for the payment of unpaid installments of support money which have already accrued is set forth in *Eberhart* v. *Eberhart,* 153 Minn. 66, 68, 189 N. W. 592, wherein we said:

'The plaintiff has taken the child from the jurisdiction of the court. So long as she keeps him without the jurisdiction, the defendant should be relieved from the payment of support money to accrue in the future *and that already accrued should not be enforced against him.*' (Italics supplied.)

> "Under the above rule it is clear that, where the wife, who by decree of divorce has been awarded the custody of minor children subject to the husband's right of reasonable visitation, deprives the husband of his right of visitation by removing the children from the state without the court's approval or without the husband's consent, the husband is relieved from the payments of all unpaid installments of support money which have *theretofore* accrued during the period he has been so denied his right of visitation."

New York also recognizes that a divorced wife who removes the children to a foreign country over the former husband's objections, and thus effectively denies the husband visitation rights, is not permitted to recover child support accrued during that period. Thus, it is clear that if Mrs. McClure, plaintiff-respondent in this action, had litigated this matter in New York, her domicile and the state in which the marriage was celebrated, she would not have been able to recover for the accrued child support involved herein. The New York case is *Goldner* vs. *Goldner,* 309 N. Y. 675, 128 N. E. 2d 321 (1955), a New York Court of Appeals decision. There the wife sought to hold the husband in contempt. The husband cross-moved to eliminate the support provisions. The trial court granted the wife's contempt motion and denied the husband's cross motion. The husband appealed, and the appellate division (135 N. Y. S. 2d 137) reversed the order, and held, as reported by the Court of Appeals of New York, as follows:

> "* * * (T)hat when separation judgment provided both for child support and visitation rights, but wife, over husband's objections, removed

children from the jurisdiction and to a foreign country for period of years, husband was entitled to temporary suspension payments until children were returned to jurisdiction when he might have right of visitation."

POINT II.

In any event, no interest was due.

Had the wife not concealed the children and her whereabouts, the payments could have been tendered and no interest would have accrued; but plaintiff made payment impossible. Therefore, it would be unjust and inequitable to assess interest in this case, at least until the plaintiff reappeared on the scene and made demand for payment in April of 1963.

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